STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
David H. Sawyer, P.J, William B. Murphy and Joel P. Hoekstra, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant.

v

GERALD LEE BABCOCK

Defendant-Appellee.
_____/

Supreme Court No. 121310

Court of Appeals No. 235518

Circuit Court No. 99-95646-FH

BRIEF OF AMICUS CURIAE

CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

By: **JACQUELINE J. McCANN (P58774)**
3300 Penobscot Building
645 Griswold
Detroit, MI 48226
(313) 256-9833

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STATEMENT OF JURISDICTION

The Criminal Defense Attorneys of Michigan accept that this matter is properly before the Court.

STATEMENT OF QUESTIONS PRESENTED

I. **MAY A SENTENCING COURT DEPART FROM THE STATUTORY SENTENCING GUIDELINE RANGE ONLY IN AN EXCEPTIONAL CIRCUMSTANCE, I.E. WHERE IT HAS A "SUBSTANTIAL AND COMPELLING REASON", AS THOSE TERMS WERE CONSTRUED IN PEOPLE V FIELDS AND ARE FURTHER LIMITED BY MCL 769.34(3)? DO APPELLATE COURTS PERFORM A MULT-FACETED REVIEW, REVIEWING THE SENTENCING COURT'S FINDING OF FACTS FOR CLEAR ERROR, REVIEWING DE NOVO ITS LEGAL CONCLUSION THAT A REASON WAS SUBSTANTIAL AND COMPELLING UNDER MCL 764.34(3), AND REVIEWING THE DEGREE OF DEPARTURE FOR PROPORTIONALITY?**

Court of Appeals answered, "Yes" in part, and "No" in part.

Amicus Curiae answers, "Yes".

STATEMENT OF FACTS

The Criminal Defense Attorneys of Michigan relies upon the parties to provide this Court with the particular facts of the case before it.

ARGUMENT

I. A SENTENCING COURT MAY DEPART FROM THE STATUTORY SENTENCING GUIDELINE RANGE ONLY IN AN EXCEPTIONAL CIRCUMSTANCE, I.E. WHERE IT HAS A "SUBSTANTIAL AND COMPELLING REASON", AS THOSE TERMS WERE CONSTRUED IN PEOPLE V FIELDS AND ARE FURTHER LIMITED BY MCL 769.34(3). APPELLATE COURTS PERFORM A MULT-FACETED REVIEW, REVIEWING THE SENTENCING COURT'S FINDING OF FACTS FOR CLEAR ERROR, REVIEWING DE NOVO ITS LEGAL CONCLUSION THAT A REASON WAS SUBSTANTIAL AND COMPELLING UNDER MCL 764.34(3), AND REVIEWING THE DEGREE OF DEPARTURE FOR PROPORTIONALITY.

In People v Hegwood, 465 Mich 432, 438; 636 NW2d 127 (2001), this Court noted that the sentencing guidelines in Michigan have existed in two different eras, first the judicial guidelines and now the statutory guidelines. The judicially created guidelines, employed from 1983 through 1998, were mandatory only in the sense that the sentencing court had to score them and articulate its basis for departing from the recommended range. Because these judicial guidelines did not have the force of law, but were only recommendations, a sentencing judge was not obligated to impose a sentence within the guidelines range. Id. at 438. The Court noted the beginning of the new era: "Effective January 1, 1999, the state of Michigan embarked on a different course. By formal enactment of the Legislature, Michigan became subject to guidelines with sentencing ranges that *do* require adherence. MCL 777.1 *et seq.*" Id. at 438 (Emphasis in original).

The Legislature had specific goals that it wanted to accomplish with the new statutory sentencing guidelines. It delegated the development of the guidelines to a sentencing commission. See MCL 769.32 and 769.33. The Legislature provided that the sentencing guidelines and any modification shall accomplish the following:

i) Provide protection for the public.

ii) Consider an offense involving violence against a person as more severe than other offenses.

iii) Be proportionate to the seriousness of the offense and the offender's prior criminal record.

iv) Reduce sentencing disparities based on factors other than offense characteristics and offender characteristics and ensure that offenders with similar offense and offender characteristics receive substantially similar sentences.

v) Specify the circumstances under which imprisonment is proper and under which intermediate sanctions are proper.

vi) Establish sentence ranges for imprisonment that were within the minimum and maximums allowed by law for the offenses to which the ranges apply.

vii) Maintain separate ranges for convictions under the habitual offender provisions . . . which may include as an aggravating factor, among other relevant circumstances, that the accused has engaged in a pattern of proven or admitted criminal behavior.

viii) Establish sentence ranges that the sentencing commission considers appropriate.

[MCL 769.33(1)(e)(iii); see also PA 1994, No 445]

The Legislature did provide that, in limited instances, a sentencing court could impose a sentence that departed from the guidelines range. The portions of MCL 769.34 specifically relevant to departures from the guideline range are as follows:

> (3) A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:

> (a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.
>
> (b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.
>
> * * *
>
> (7) If the trial court imposes on a defendant a minimum sentence that is longer or more severe than the appropriate sentence range, as part of the court's advice of the defendant's rights concerning appeal, the court shall advise the defendant orally and in writing that he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range.
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> (11) If, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter.

In People v Babcock, 244 Mich App 64; 624 NW2d 479 (2001)("Babcock I"), the Court of Appeals issued its first published pronouncement in respect to appellate review of departures from the statutory guidelines. The Court reasoned that the Legislature is presumed to know of the existing judicial interpretation of statutory language in the same subject area and that by its silence evidences its agreement with the judicial construction. Id. at 74. The Court held that by using the phrase, "substantial and compelling", in MCL 769.34, the same phrase it had used in regard to departures from mandatory minimum sentences in the controlled substances act, but without providing any definition for this phrase, the Legislature was adopting the judicial

interpretation of those words by this Court in People v Fields, 448 Mich 58; 528 NW2d 176 (1995). Babcock I, supra at 74-75.

In Fields, this Court construed the phrase "substantial and compelling" by looking to the common and approved meaning of the words:

> *Webster's New World Dictionary, Third College Edition* defines "substantial" in relevant part, as, "**2 real; actual; true; not imaginary 3 strong; solid; firm; stout 4 considerable; ample; large 5 of considerable worth or value; important**. . . ." It defines "compelling" in relevant part, as, "**irresistibly or keenly interesting, attractive, etc.; captivating . . . .**"
>
> From these definitions it is evident that the words "substantial and compelling" constitute strong language. The Legislature did not wish that trial judges be able to deviate from the statutory minimums for any reason. **Instead, the reasons justifying**

> Appeals in *Hill, supra*. This test allows judges to consider many of the factors traditionally utilized in formulating sentences. **It also provides restrictions to assure that the Legislature's intent in passing the statute will not be subsumed by the use of what is intended to be an exception to the rule** of long mandatory sentences.
>
> [Id. at 68-69 (emphasis added)].

It does indeed appear that the Legislature intended the use of the Fields' definition of "substantial and compelling." The Legislature's use of the same language, "substantial and compelling," as in the drug statute for departures[1], and the history of this Court and the Court of Appeals having construed those words over time are compelling evidence of this. The Fields Court's findings regarding the common and approved meaning of the words remain as valid today as they were in 1995. Further, as in Fields, the legislative intent in this instance[2] also demands this interpretation of "substantial and compelling," a real, actual reason (i.e., objective and verifiable reason) of considerable worth that keenly and irresistibly grabs one's attention. This definition only allows sentencing judges to depart in exceptional circumstances.

Where the Babcock I Court went wrong was when it adopted wholesale the standards of review that the Fields Court delineated. It further erred when it pronounced that the sentencing guidelines legislation did not provide for any appellate review of the proportionality of a sentence once the reviewing court concluded that a substantial and compelling reason for departure existed. It drew these conclusions without proper regard for the language of MCL 769.34(11), MCL 769.34(3), and MCL 769.33(e)(iii).

The Babcock I Court held that the Legislature intended that appellate courts use the same standards of review that this Court set out for departures from mandatory minimum sentences

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[1] MCL 333.7401(4) states in relevant part: "The court may depart from the minimum term of imprisonment authorized under subsection (2)(a)(ii), (iii), or (iv) if the court finds on the record that there are substantial and compelling reasons to do so.

under the drug statute in Fields, for the same reasons that it had held that the Legislature intended to adopt the Fields Court's definition of "substantial and compelling". Thus, under the controlling precedent of Babcock I, appellate courts are to review the trial court's factual determinations for clear error, review whether a particular factor is objective and verifiable as a matter of law de novo, and finally review whether the objective and verifiable factors constitute substantial and compelling reasons to depart for an abuse of discretion. Babcock I, supra at 75-76, 78.

On the prosecutor's appeal from Gerald Babcock's resentencing, in People v Babcock, 250 Mich App 463, 467 n 3; 648 NW2d 221 (2001)(Babcock II), a different panel of the Court of Appeals questioned part of the Babcock I Court's holding. The Babcock II Court questioned the Babcock I Court's "holding regarding the abuse of discretion standard in light of the language in MCL 769.34(11), which appears to suggest that our review is de novo." But being bound to it by MCR 7.215(I), the Babcock II Court went on to apply the abuse of discretion standard.

The Babcock II Court was right about the proper standard of review. There was no comparable language to MCL 769.34(11) in the drug statute that this Court was concerned with in Fields, supra. Under the plain language of MCL 769.34(11), quoted supra, whether or not the reason or reasons cited by the trial court in support of its departure from the guidelines range constitutes a substantial and compelling reason(s) is a question for the appellate court to review anew without deference to the trial court. MCL 769.34(11) directs the appellate court to review the record and to remand for resentencing if it determines that the reason on which the trial court based its departure was not substantial and compelling. This is the equivalent of a de novo review.

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[2] See MCL 769.33, quoted supra, and PA 1994, No 445.

Included as part and parcel of this de novo review of whether the trial court had a substantial and compelling reason to depart are the legal questions of MCL 769.34(3)(a) and (b), quoted supra. These questions are whether the trial court based the departure on impermissible reasons in violation of MCL 769.34(3)(a) and, if the trial court based the departure on a characteristic already taken into account by the guidelines, whether or not the characteristic was given inadequate or disproportionate weight.

Beyond the plain language of MCL 769.34(11), it would defeat the stated legislative purpose of the guidelines if a trial court's decision to depart were reviewed under the most deferential standard, i.e. abuse of discretion. The Sentencing Commission spent years drafting the guidelines to accomplish the goals mandated by the Legislature and the guidelines, as created, are very thorough.[3] A non-deferential review, i.e. a de novo review, of the trial court's proffered reason or reasons for the departure from those guidelines is what the Legislature intended.

As for upward versus downward departures, this Court has observed that in MCL 769.34(3), the Legislature made no apparent distinctions between upward and downward departures. Hegwood, supra at 440 n 16. This is true, but in practical terms it will be harder to

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[3] The Prior Record Variables under the new statutory scheme are similar to those under the judicial guidelines, but under the statutory guidelines an offender with a prior record may be assessed *more* points than he would have been under the judicial guidelines on 5 of the 7 variables. For example, under the statutory guidelines an offender with 3 or more prior high severity felonies will be assessed 75 points, while under the judicial guidelines he would only have been assessed 50 points. Compare also PRVs 3, 4, 5, and 6. For Offense Variables, a comparison of the variables to be scored under the judicial guidelines for assault offenses, criminal sexual conduct offenses, and homicide offenses, with the variables to be scored under the statutory guidelines for crimes against a person (keeping in mind which variables would be scored for assault offenses, criminal sexual conduct offense, and homicide offense according to the instructions) reveals that under the judicial guidelines only 8, 9, and 7 variables would be scored respectively, while under the statutory guidelines, at least 13 variables would be scored. [Compare Michigan's Sentencing Guidelines, 1988, second edition with West's Michigan Sentencing Guidelines Manual, 1999 edition.]

sustain an upward departure. This is so because MCL 769.34(3)(b) forbids departures based on a factor already accounted for in the guidelines, unless the factor was given inadequate or disproportionate weight, and the sentencing guidelines themselves consist entirely of ***aggravating factors.***[4] The guidelines do not provide for point reductions for mitigating factors, e.g. youth, mental retardation, or a limited aider and abettor role.

A review of the statutory language shows that the Babcock I Court was also wrong when it concluded that the sentencing guidelines legislation did not provide for any appellate review of the proportionality of a sentence once the reviewing court concluded that a substantial and compelling reason for departure existed. In Babcock I, the Court of Appeals found:

> If we conclude that a substantial and compelling reason exists, the defendant's sentence must be affirmed as long as the sentence otherwise comports with the statute and other requirements of law. [Citations omitted.] We find no authorization in the statute for this Court to further review the overall sentence under the Milbourn principle of proportionality. We are, of course, not so presumptuous as to suggest that this Court could overrule Milbourn. Until and unless our Supreme Court says otherwise, Milbourn remains good law. However, we simply cannot conclude that the Legislature intended to incorporate the principle of proportionality into the new sentencing review framework.

Judge Hood concurred in the result to remand for resentencing, but wrote separately to declare that the principle of proportionality was not dead:

> Review of MCL 769.34(3)(b); MSA 28.1097(3.4)(3)(b) reveals that the Legislature has not abandoned the principle of proportionality, but, rather, incorporated the principle into the sentencing guidelines and it is to be taken into consideration when departing from the sentencing guidelines.
> [Babcock I, supra (Judge Hood's concurrence) at 489].

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[4] In contrast to the Federal Sentencing Guidelines, which provide for downward "adjustments" to the offense level for mitigating factors [e.g. sec 3B1.2 ("mitigating role" – minimal or minor participant), 3E1.1 ("acceptance of responsibility", e.g. turning self in, pleading guilty)] and provide guidance on factors for downward departures, such as: age (sec 5H1.1), physical condition (sec 5H1.4), cooperation with the authorities (sec 5K1.1), and/or diminished capacity (sec 5K2.13). See West's Federal Sentencing Guidelines Manual, 2001 Edition.

In People v Milbourn, 435 Mich 630, 636; 461 NW2d 1 (1990), this Court held that the principle of proportionality required sentences to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. This Court held that a sentence that violated the principle of proportionality was an abuse of judicial sentencing discretion. Id.

Here, the Legislature sought to include the principle of proportionality in the sentencing guidelines. The Legislature directed the Sentencing Commission that the sentencing guidelines it developed must, among other things, "[b]e proportionate to the seriousness of the offense and the offender's prior criminal record." MCL 769.33(1)(e)(iii). So it can be said that sentences within the appropriate guidelines range are at least presumptively proportionate. Accordingly, the Legislature provided in MCL 769.34(10), in relevant part, that: "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals **shall affirm** that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." (Emphasis added.)

But departures from the sentencing guidelines range do not enjoy the same presumption of proportionality. As this Court noted in Hegwood, the plain language of MCL 769.34(3) evidences the Legislature's requirement that any departure from the guidelines range be proportionate to the substantial and compelling reason that led to the departure. Hegwood, supra at 437, n 10. "A court may depart . . . if the court has *a substantial and compelling reason for* ***that*** *departure* and . . ." MCL 769.34(3) [Emphasis added]. This language does not suggest "that the Legislature intended, in every case in which a minimal upward or downward departure is justified by 'substantial and compelling' circumstances, to allow unreviewable discretion to depart as far below or as far above the guideline range as the sentencing court chooses." Hegwood, supra at 437, n 10. Instead the language suggests that "the 'substantial and

compelling' circumstances articulated by the court must justify the *particular* departure in a case". Id. (Emphasis in the original).

Thus, if the degree of departure is not proportionate to the substantial and compelling reasons that the sentencing court relied upon, then the sentencing court has abused its discretion. See Milbourn, supra at 636 ("a given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality"). The underlying question of whether or not the degree of departure is proportionate to the reason given for the departure is a legal question, reviewed de novo. If the departure is not proportionate, then the sentencing court has abused it discretion. See People v Lukity, 460 Mich 484, 488; 596 NW2d 607 (1999)(preliminary questions of law are reviewed de novo).

In its orders granting leave to appeal in these two cases, this Court also asked the parties to address the issue of this Court's standard of review. People v Aliakbar, __ Mich __; 651 NW2d 921 (2002); People v Babcock, __ Mich __; 651 NW2d 921 (2002). The standard of review for this Court on issues of sentencing departures is the same as that for the Court of Appeals. See People v Leblanc, 465 Mich 575, 579; 640 NW2d 246 (2002)(in conducting an appellate review of the manner in which the Circuit Court and the Court of Appeals have decided an issue raised, the Supreme Court begins by locating the proper standard of review by first determining the type of question(s) asked by the issue at hand, e.g. a trial court's findings of fact are reviewed for clear error and questions of law are reviewed de novo, and then performs the review.) This Court should not take the Legislature's use of the words "court of appeals" in MCL 769.34(10) and (11) as any limitation of its powers of review. The Legislature did not expressly limit this Court's review power. Surely, if the Legislature wanted to limit this Court's review, a drastic, dramatic, and unheard of move, it would do so in the most explicit language.

Further, the sentencing legislation as a whole, and the Legislative history, do not indicate an intent on the Legislature's part to limit this Court's power of review.

SUMMARY AND REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, the **CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN** asks this Honorable Court to interpret the phrase "substantial and compelling" as advanced above and to clarify the standards of review as advanced above.

Respectfully submitted,

CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

By: _____
Jacqueline J. McCann (P58774)
Member

Dated: January 7, 2002
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